Supreme Court, U.S.
FILED

NO. (1)

981504 JAN 27 1999

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM 1998

ROBERT L. COMEAUX

Plaintiff-Appellant

V.

UNITED FOOD AND COMMERCIAL WORKERS LOCAL UNION NO. 455; UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC; RAY B. WOOSTER

Defendants-Appellees

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI VOLUME I

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7 pp

STATEMENT OF THE ISSUES ASSERTED FOR CONSIDERATION

(A) Whether under *Finnegan v. Leu,* an appointed union official can assert rights under §101(a)(1) and (2) of the LMRDA for infringement of protected rights, including freedom of assembly, freedom of speech and right to participate in elections; and

(B) Under what circumstances does §101(a)(1) and (2) of the LMRDA afford appointed officials a claim for relief if employment is terminated as "part of a purposeful and deliberate attempt to suppress dissent within the union."

(C) Whether the trial court erred in granting summary judgment against plaintiff, given its erroneous finding that plaintiff did not assert a violation of his free speech rights, and there being no finding, or alternatively an erroneous finding, on the issue of whether plaintiff's claims bring him within the "purposeful and deliberate attempt to suppress dissent within the union exception to the broad holding in *Finnegan v. Leu.*"

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Plaintiff-Appellant certifies that the following listed persons and entities have a financial interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

Plaintiff-Appellant: Robert L. Comeaux is an individual residing in San Antonio, Texas. The attorney of record is Thad Harkins of the law firm of Harkins, Latimer & Dahl, P.C. in San Antono, Texas.

Defendants-Appellees: United Food and Commercial Workers Local Union No. 455 is a local labor organization, organized and existing as a local of the United Food and Commercial Workers International Union, AFL-CIO, CLC. Ray B. Wooster is an individual residing in Willis, Texas. Local 455 and Ray B. Wooster are represented by Patrick M. Flynn of Houston, Texas, and the International Union is represented by Eric H. Nelson of Houston, Texas.

/s/ Thad Harkins

THAD HARKINS

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STATEMENT OF THE JURISDICTIONAL BASIS FOR THE COURT'S REVIEW OF THIS CASE

Suit was filed by Plaintiff on September 15, 1994, in the United States District Court, Western District of Texas, Civil Action No. SA-94-CV-771, alleging violation of 29 U.S.C. §411(a)(1) and (2), the Americans with Disabilities Act and 42 U.S.C. §1985(3). Jurisdiction of the federal district court in this case is conferred by 28 U.S.C. §1331. After initial discovery including the depositions of the individual parties, Defendants filed their respective partial summary judgment motions. The trial Court, after reviewing the briefs of the parties, entered its order granting summary judgment of all remaining claims on September 30, 1997. The Plaintiff filed his motion for new trial, and notice of appeal was filed on December 29, 1997. By panel decision dated October 2, 1998, Garwood, Jolly and Barksdale, Circuit Judges, a per curiam opinion affirming the trial court's ruling was entered. Rehearing was denied by order dated October 29, 1998. Accordingly, jurisdiction of this Court is conferred under 28 U.S.C. §1254(1).

STATUTES AT ISSUE

29 U.S.C. §411. Bill of rights; constitution and by laws of labor organizations.

(a)(1) Equal rights

Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organizations' constitution and bylaws.

(2) Freedom of speech and assembly

Every member of any labor organization shall have the right to meet and assemble freely with other members, and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: provided, that nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

(3) Dues, initiation fees, and assessments

Except in the cases of a federation of national or inter-

STATUTES AT ISSUE (continued)

national labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on September 14, 1959 shall not be increased, and no general or special assessment shall be levied upon such members, except -

(A) in the case of a local labor organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or

(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in s membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: provided, that such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization.

STATUTES AT ISSUE (continued)

(4) Protection of the right to sue

No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: provided, that any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: and provided further, that no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

(5) Safeguards against improper disciplinary action

No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

(b) Invalidity of constitution and bylaws

Any provision of the constitution and bylaws of any

labor organization which is inconsistent with the provisions of this section shall be of no force or effect.

29 U.S.C. §412. Civil Action for infringement of rights; jurisdiction

Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

29 U.S.C. §413. Retention of existing rights of members

Nothing contained in this subchapter shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization.

29 U.S.C. §414. Right to copies of collective bargaining agreements

It shall be the duty of the secretary or corresponding principal officer of each labor organization, in the case of a local labor organization, to forward a copy of each collective bargaining agreement made by such labor organization with any employer to any employee who requests such a copy and

whose rights as such employee are directly affected by such agreement, and in the case of a labor organization other than a local labor organization, to forward a copy of any such agreement to each constituent unit which has members directly affected by such agreement; and such officer shall maintain at the principal office of the labor organization of which he is an officer copies of any such agreement made or received by such labor organization, which copies shall be available for inspection by any member or by any employee whose rights are affected by such agreement. The provisions of section 440 of this title shall be applicable in the enforcement of this section.

29 U.S.C. §415. Information to members of provisions of chapter

Every labor organization shall inform its members concerning the provisions of this chapter.

STATEMENT OF FACTS NECESSARY TO THE ARGUMENT OF THE ISSUES

Plaintiff was an employee of the United Food and Commercial Workers Union and its predecessor in interest from 1971 until his termination from employment on September 16, 1992, other than brief employment with the AFL-CIO, of which the UFCW was the largest affiliate. Plaintiff, as discussed in the argument and authorities, was an appointed official of the Local, and had previously raised concerns and expressed his desire to seek election against the successor and heir apparent to the Local President, Ray Wooster. Plaintiff originally raised claims of conspiracy under §1985(3) and the Americans with Disabilities Act. Plaintiff has not appealed and does not assert these claims in this petition, except to the extent that the granting of certiorari may occasion a review on remand of the claims under §1985(3).

ARGUMENT AND AUTHORITIES

Robert L. Comeaux, Plaintiff and Appellant files this Petition for Writ of Certiorari, showing that the trial court's opinion and the Fifth Circuit's order of affirmance, filed October 2, 1998, are erroneous; and that upon granting of this writ, this cause should be reversed and remanded.

Background

1. The trial court held that Plaintiff's claims of violation of the "Union Members' Bill of Rights," 29 U.S.C.A. §§411-415, are barred under the Supreme Court decision in *Finnegan v. Leu,* 456 U.S. 431, 102 S.Ct. 1867, 72 L.Ed. 2d 239 (1982). The Fifth Circuit's per curiam opinion, attached as an appendix to this motion, provides no reasoning other than affirmance of the trial court's order granting summary judgment (R000561-000576). *Finnegan,* as well as all of its progeny, have recognized that although a new president of a local union has the right to terminate the employment of appointed employees of the local union in order to "choose a staff whose views are compatible with his own", it does not bar a plaintiff's cause of action challenging a union's authority to utilize dismissal from union office as "part of a purposeful and deliberate attempt to...suppress dissent within the union." 456 U.S. at 441, 102 S.Ct. at 1873. *See also Adams-Lundy v Association of Professional Flight Attendants,* 731 F.2d 1154, 1159 (5th Cir. 1984) (acknowledging that in such an attempt, "the firing of even an appointed official would presumably violate the Act").

2. Plaintiff, as pled in his original complaint, asserts this very exception, and neither the district court nor the Fifth Circuit

has addressed the Plaintiff's pleadings and proof which, if taken as true as required, put his claims within such exception. Plaintiff's complaint itself alleges that the action is "part of a deliberate attempt to suppress dissent within the Defendant Local" (R000006) and throughout the record below, in deposition and affidavit testimony. Plaintiff's proffer of such is unrefuted. (*See* Plaintiff's deposition excerpts, attached as No. 8 to Plaintiff's Appeal Brief; Affidavit of Clara Jean Bane (R000313-316), attached as No. 10 to Plaintiff's Appeal Brief).

3. In addition, the claims in this case, taking the allegations contained in the complaint as true for purposes of summary judgment, establish that Plaintiff was actively in opposition to the Local leadership's actions as a *member* of Local 455, and it was known to the Local's leadership that Plaintiff himself was seeking election in an upcoming election in which Defendant Wooster had already announced he would not run. (R000004-5). Thus, the narrow holding in *Finnegan,* that a new president could surround himself with supporters rather than opponents, is not applicable. Even Wooster admitted in his deposition in this case that Plaintiff did not act unloyal to Defendant Wooster, and was not insubordinate to Wooster. (See Response to Partial Motion for Summary Judgment, (R000269) and Wooster deposition excerpts cited therein.) The basis for the termination in this case was Plaintiff's exercise of his right to be involved in the Local election process and his right of free speech and assembly, protected under Sections 101(a)(1) and (2) of the Union Members' Bill of Rights.

4. The trial court below, in conclusory fashion, states that "Plaintiff does not claim that he was denied the right to vote or express his opinions on matters of concern to the

union as a rank and file member." (R at 000572-3). This is not true. What the trial court failed to recognize and acknowledge is that Plaintiff was terminated within days of speaking out *as a member* in August and September, 1992, and for expressing his interest in seeking the presidency in the upcoming election. Months later, but before the election, Defendant Wooster's hand-picked successor, Richard Elliott, which Plaintiff asserts was due to the erroneous belief that Plaintiff's membership had lapsed, threatened to remove him from one of the Local's meetings, and have him arrested. (R000363, R000377, R000382, R000387-388). Nothing in *Finnegan* addresses this issue. As pointed out by Justice White in his concurring opinion in *Sheetmetal Workers International Association v. Lynn,* 488 U.S. 347, 109 S.Ct. 639, 102 L.Ed. 2d 700 (1989):

> the speech for which Respondent was removed was also speech in the capacity of a member.... In this case, unlike *Finnegan,* respondent was not discharged by an incoming elected president with power to appoint his own staff, but by a trustee whose power to dismiss and appoint officers...went no further than the Local's president's to discharge for cause.... Respondent's speech opposing the dues increase was the speech of a member about a matter the members were to resolve, and there is no countervailing interest rooted in union democracy that suffices to override that protection.
>
> Thus, I doubt that resolution of cases like this turns on whether an officer is elected or appointed. Rather its inquiry is whether an officer speaks as a member or as an officer in discharge of his assigned duty. If the former, he is protected by Title I....

Lynn, 488 U.S. at 360, 109 S.Ct. at 647 (White, J., concurring).

Application of *Finnegan/Lynn*

5. In *Lynn*, the Supreme Court majority, in an important footnote, backs away from the harsh reading of *Finnegan* adopted by the trial court in this case. *Lynn*, 488 U.S. at 355, FN 7. The court makes it clear that there are a number of possible circumstances where an appointed local union official might present a cognizable claim under Section 102, and that *Finnegan* is limited to its own facts. Like the successful plaintiff in *Lynn*, Plaintiff was retaliated against for his opposition to the incumbent administration who had hired him and was also deprived of his rights due to his intent to run for election against the hand-picked successor to the incumbent president. Unlike *Finnegan*, plaintiff's termination was not part of any "house cleaning" by a newly elected Local president, but for alleged economic reasons, which Plaintiff would show at trial, upon reversal and remand, to be pretextual in nature.

6. Rather than the distinction between an elected and an appointed official, the only real distinction between Plaintiff's situation and Lynn's was that Lynn had been elected rather than appointed to the same position Plaintiff held (business agent), and that in addition to speaking out against the policies and actions of the incumbent who had appointed and retained him, Plaintiff became a candidate for the local election to be held the following year. Plaintiff, like the Plaintiff in *Lynn*, paid a price for the exercise of his membership rights, and his removal created a harsh chilling effect on his speaking out in the future, or at the very least, relegated him to the role of an outsider and a perceived disgruntled ex-

employee, not the best place from which to build member support in an election, allegedly carried out under a democratic process. Thus, Plaintiff stands in the same shoes, though appointed, as the Plaintiff in *Lynn*, in both his membership rights as well as his right to be visible as a candidate for the upcoming election.

7. In the case at bar, the reason given to Plaintiff for termination was not failure to support new leadership, but was instead that he was being "laid-off" for alleged financial reasons, though Defendant Wooster admitted he had no documentation supporting the layoff. (R000469, 000484). As revealed in the deposition excerpts attached to Plaintiff's appeal brief, Plaintiff has knowledge of a comment by Defendant Wooster that "the Local would not have to worry about him after December of 1992," because his eligibility for membership would have expired. (R000382). Thus, unlike *Finnegan,* there is in this case a triable issue of fact on the intent to injure Plaintiff's membership status itself. Though at least twelve positions became available through international union subsidies within weeks after Plaintiff was laid off for alleged financial reasons, Plaintiff was not rehired when such new positions, for which he was qualified, were filled. (R000495, R000005).

Conflict Between the Circuits

8. One recent case from another Circuit clearly on point establishes that the distinction between elected and appointed union officials does not control where the issue is one of suppression of dissent. *Thompson v. Office and Professional Employees International Union, AFL-CIO,* 74 F.3d 1492 (6th Cir. 1995), *cert. denied,* 117 S.Ct. 482 (1996). In *Thompson,*

the appointed official prevailed on his LMRDA claim, in facts strikingly similar to this case. Thompson, after over twenty years of union work, was *appointed* to a local staff as a business representative (like Plaintiff); shortly before election nominations took place. Thompson acknowledged his interest in running for Local office and raised concerns about the Local's administration (like Plaintiff); shortly after this, the incumbent took steps to injure his eligibility to run through an attack on his membership status (like Plaintiff); after doing so, Thompson was fired (unlike Plaintiff, by a trustee appointed by the International); and ultimately, another reform candidate won (like Plaintiff's case). *Id.*,at 1496-1500.

9. There is evidence in this case, as in *Thompson*, of intent to injure Plaintiff's employment status as a result of his protected activity. What was different is that *Thompson was never even a member of the union,* though he was afforded rights that your Plaintiff, Bob Comeaux, a member of Local 455, has not been afforded in this case. In addition, at least one District Court in the Fifth Circuit has held that where an employee wears two hats, that of rank-and-file member and appointed official, he is protected in his Article I rights. *Kirk v Transportation Workers Union of America,* 934 F.Supp. 775, 787-788 (S.D.Tex. 1995).

10. Other Circuits have taken the position advocated by Plaintiff in this case. For example, in *Schermerhorn v Local 100, Transport Workers Union of America,* 91 F.3d 316 (2nd Cir. 1996) the Court affirmed Judgment for Plaintiffs who were members of a reform caucus (like Plaintiff), where union officers are silenced in a scheme to suppress dissent, and where the jury found the required finding of such a

deliberate scheme under a clear and convincing evidence standard. Like Plaintiff, one of the plaintiffs in *Schermerhorn* was thwarted in his attempt to gain access to a meeting of the local.

11. Similarly, and consistent with *Thompson, Kirk* and *Schermerhorn,* a Colorado District Court found against a UFCW local and its president in a case strikingly similar to Plaintiff's. *Nixon v. United Food and Commercial Workers International Union, Local No. 7*, 751 F.Supp. 1491 (D.C. Col. 1990). In *Nixon,* the plaintiff provided the type of proof, affidavit and deposition, which Plaintiff has offered in this case. Unlike the trial court in this case, the district court there properly reviewed the evidence, and determined that a fact issue existed which required a trial on the merits. This honorable Court is asked to cause the same to be done in this case.

Conclusion

Thus, there appears to be a conflict between the Circuits, and even uncertainty in this Circuit, which deserves clarification by this court. This case presents a unique set of facts, not previously addressed by this court, which lies within the narrow exception created and allowed for an appointed union employee asserting his Article I rights under *Finnegan v Leu*. Moreover, reconsideration and remand in this case is consistent with the reasoning of this Court in *Adams-Lundy*, as Plaintiff has met the threshold burden that case applies to survive attack under the Federal Rules of Civil Procedure. Importantly, reversal and remand for trial on the merits in this case preserves the democratic purposes of the Union Members' Bill of Right — to permit and encourage all members, even officials, to speak out against corrupt and improper acts by union leaders, and to participate in and seek office through democratic elections without fear of retaliation and reprisal.

Respectfully Submitted

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COUNSEL OF RECORD FOR APPELLANT/PETITIONER

APPENDIX 1

98-50013

GENERAL DOCKET FOR
FIFTH CIRCUIT COURT OF APPEALS

Court of Appeals Docket #: 98-50013 Filed: 1/6/98
Nsuit: 3730 Labor: Reporting/Disclosure
Comeaux v. Local Union 455, et al
Appeal from: Western District of Texas, San Antonio

- -

Lower court information:

District: 0542-5 : SA-94-CV-771
Ordering Judge: Samuel Fred Biery, Jr. US District Judge
Date Filed: 9/15/94
Date order/judgment: 10/1/97
Date NOA filed: 12/29/97

- -

Fee status: Paid

- -

Prior cases:
None
Current cases:
None

Docket as of January 27, 1999 8.56 am Page 1

Proceedings include all events.
98-50013 Comeaux v. Local Union 455, et al

ROBERT L COMEAUX Plaintiff - Appellant	Thad Harkins FTS 527-0901 210-527-0900 [COR LD NTC ret] Harkins, Latimer & Dahl 405 N St Mary's Street San Antonio, TX 78205
v.	
UNITED FOOD AND COM- MERCIAL WORKERS LOCAL UNION NO 455 Defendant - Appellee	Patrick M Flynn FTS 861-2568 713-861-6163 [COR LD NTC ret] 1235 N Loop West Suite 1235 Houston, TX 77008
UNITED FOOD AND COM- MERCIAL WORKERS IN- TERNATIONAL UNION, AFL-CIO, CLC Defendant - Appellee	Eric H Nelson FTS 524-4421 (713) 526-1998 [COR LD NTC ret] 3303 Main Street Suite 300 Houston, TX 77002
RAY B WOOSTER Defendant - Appellee	Patrick M Flynn (see above) [COR LD NTC ret]

Proceedings include all events.
98-50013 Comeaux v. Local Union 455, et al

ROBERT L COMEAUX

Plaintiff - Appellant

v.

UNITED FOOD AND COMMERCIAL WORKERS LOCAL UNION NO. 455; UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC; RAY B WOOSTER

Defendants - Appellees

Proceedings include all events.
98-50013 Comeaux v. Local Union 455, et al

1/6/98	Private civil federal case docketed. NOA filed by Appellant Robert L. Comeaux. [98-50013]
1/26/98	Appearance form filed by Eric H Nelson for Appellee United Food Cmercl. [98-50013]
1/28/98	Appearance form filed by Patrick M Flynn for Appellee Ray B Wooster, Appellee United Food Cmercl. [98!50013]
1/30/98	Record on appeal filed. Pleadings: 3 vols. [98-50013] ROA ddl satisfied.

2/11/98 Briefing notice issued. [98-50013] A/Pet's Brief due on 3/23/98 for Robert L Comeaux.

3/10/98 Extension granted by phone until: 4/22/98 to file brief for Appellant Robert L Comeaux. [98-50013]

3/16/98 Confirmation letter filed by Appellant Robert L Comeaux confirming an extension of time to and including 4/22/98 for filing brief. [98-50013] A/Pet's Brief ddl updated to 4/22/98 for Robert L Comeaux.

3/16/98 Appearance form filed by Thad Harkins for Appellant Robert L Comeaux. [98-50013]

3/31/98 Record on appeal released to attorney Thad Harkins for Appellant Robert L Comeaux. Volumes: 3. [98-50013]

4/22/98 Unopposed motion filed by Appellant Robert L Comeaux to extend time to file appellant(s) brief until 5/5/98 [917820-1] [98-50013]

4/24/98 CLERK Order filed granting appellant's unopposed motion to extend time to file Appellant's Brief until 5/5/98 [917820-1] A/Pet's Brief ddl updated to 5/5/98 for Robert L Comeaux. Copies to all counsel. [98-50013]

5/7/98 Appellant's Brief filed by Appellant Robert L Comeaux. Copies of brief: 7 # of pages: 12. Date of COS: 5/5/98 Sufficient [Y/N] : N, proportional type too small. [98-50013] A/Pet's Brief ddl satisfied. E/Res's Brief due on 6/8/98 for Ray

B Wooster, for United Food Cmercl, for United Food Cmercl. Sufficient Brief due on 5/21/98 for Robert L Comeaux.

5/7/98 Record excerpts filed by Appellant Robert L Comeaux # of copies: 4 Sufficient [Y/N] : N, dkt entry dates deleted, excess pages & needs COS. [98-50013] Sufficient Record Excerpts due on 5/21/98 for Robert L Comeaux

5/22/98 Brief made sufficient by Appellant Robert L Comeaux [98-50013] Sufficient Brief ddl satisfied.

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Proceedings include all events.
98-50013 Comeaux v. Local Union 455, et al

5/22/98 Record Excerpts made sufficient by Appellant Robert L Comeaux [98-50013] Sufficient Record Excerpts ddl satisfied.

6/5/98 Record on appeal returned to 5CCA. Volumes: 3 [98-50013]

6/5/98 Appellee's Brief filed by Appellee United Food Cmercl, Appellee United Food Cmercl, Appellee Ray B Wooster. Copies of Brief: 7 # of pages: 24. Date of COS: 6/3/98 Sufficient [Y/N] : Y. [98-50013] E/Res's Brief ddl satisfied. Reply Brief due on 6/19/98 for Robert L Comeaux.

6/9/98 Unopposed Motion filed by Appellee United Food Cmercl, Appellee United Food Cmercl,

Appellee Ray B Wooster to file corrected brief [961294-1]. [98-50013]

6/9/98 CLERK Order filed granting appellees, United Food and Commercial Workers Local Union, United Food and Commercial Workers International and Ray B. Wooster's unopposed motion to file corrected brief [961294-1] Copies to all counsel. [98-50013]

6/9/98 We are withdrawing appellee brief(s) [960065-1] filed by Appellee United Food Cmercl, Appellee United Food Cmercl, Appellee Ray B Wooster. [98-50013]

6/9/98 Appellee's Corrected Brief filed by Appellee United Food Cmercl, Appellee United Food Cmercl, Appellee Ray B Wooster Copies of Brief: 7 # of pages: 25. Date of COS: 6/8/98 Sufficient [Y/N]: y. [98-50013]

6/26/98 Briefing Complete. [98-50013] Reply brief ddl canceled.

10/2/98 Opinion filed. Issue Mandate due on 10/23/98. [98-50013]

10/2/98 Judgment entered and filed. [98-50013]

10/16/98 Petition filed by Appellant Robert L Comeaux for rehearing. # of copies filed: 4 [1086967-1] Issue Mandate ddl canceled. [98-50013]

10/29/98 COURT Order filed denying petition for rehearing

[1086967-1] Issue Mandate due on 11/5/98. Copies to all counsel. [98-50013]

11/6/98 Mandate issued. Approved BOC Issued (Y/N)?: n [98-50013] Issue Mandate ddl satisfied.

11/6/98 Record on appeal returned to USDC. Volumes: 3. [98-50013]

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APPENDIX 2

900561

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SEP 30 1997

ROBERT L. COMEAUX	§	
	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION
	§	NO. SA-94-CA-0771
UNITED FOOD AND	§	
COMMERCIAL WORK-	§	
ERS LOCAL UNION	§	
NO. 455, UNITED FOOD	§	
AND COMMERCIAL	§	
WORKERS INTER-	§	
NATIONAL AFL-CIO,	§	
CLC; and RAY B.	§	
WOOSTER,	§	
	§	
Defendants.	§	

ORDER CONCERNING PENDING MOTIONS FOR SUMMARY JUDGMENT

Pending before the Court are the following motions: (1) Defendants United Food and Commercial Workers Local Union 455 and Ray B. Wooster's Motion for Partial Summary

Judgment (docket #33); (2) Defendants United Food and Commercial Workers Local Union 455 and Ray B. Wooster's Motion for Partial Dismissal (docker #35); and (3) Motion for Summary Judgment of Defendant United Food and Commercial Workers International Union (docket #37). Although the Court is empathetic with life's vicissitudes confronted by plaintiff, it is the Court's opinion, based on the law and the record herein, that defendants' motions be granted.

I. FACTS

In the complaint, plaintiff claims he was terminated from his employment as a business agent for defendant United Food and Commercial Workers Local Union 455 (Local) in retaliation for seeking the office of local president and also substantially in response to a reasonable work restriction which had been placed on him as a recovering "workaholic" (work restriction of no more than 45 hours a week). Defendant Wooster was the former president of the defendant Local and simultaneously a vice president of defendant United Food and Commercial Workers International Union (International). Defendant Wooster had general supervisory authority over all the affairs of the defendant Local and controlled the employment decisions at issue in this case.

In August and September of 1992, plaintiff was employed by defendant Local as a business representative with his union office located in San Antonio. During this time, plaintiff learned that Mr. Wooster intended to step down as president of the Local and had hand-picked a succcessor. Based on that information, plaintiff took overt actions in support of his own candidacy for president of the Local on or about August 30, 1992. On September 12, 1992, defendant

Local's staff members were advised that current professional staffing would continue for several months and any potential layoffs were several months away. On or about September 16, 1992, plaintiff received a letter advising him he was selected to be laid off on or about October 3, 1992.

After the effective date of plaintiff's alleged layoff, defendant international actually increased its subsidy to defendant Local and additional staff members were hired using those funds. Plaintiff was not recalled to work. Defendant Wooster told plaintiff he would be happy to help him get a job in another union or give him a letter of recommendation but only if plaintiff would immediately accept reemployment elsewhere and thereby become ineligible to continue to run for the president of the defendant Local.

Plaintiff claims the defendants unlawfully terminated him from employment and then failed to recall him largely because of his exercise of protected free speech rights, including campaigning for the office of president of defendant Local, all in violation of plaintiff's rights under 29 U.S.C. § 411 (a) (1) and (2). Plaintiff also alleges defendant Wooster conspired with other employees and agents of the defendant Local and defendant International to injure plaintiff's employment relationship. The acts committed in furtherance of the conspiracy included terminating plaintiff in a false layoff and then failing to recall him to available work. This conduct violated plaintiff's rights under 43 U.S.C. § 1985 (2).

Also included in plaintiff's complaint is a claim under the Americans with Disabilities Act. Plaintiff claims the defendants terminated his employment and then failed to recall him because of his restriction of working no more than

45 hours per week. This claim was dismissed with prejudice as to defendant United Food and Commercial Workers International Union AFL-CIO, CLC on January 24, 1997 (docket #40).

II. SUMMARY JUDGMENT STANDARD

Summary judgment should be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56 (c). An issue is considered "genuine" if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party, and a fact is considered "material" if its resolution in favor of one party might affect the outcome of the suit under governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)

The moving party is "entitled to judgment as a matter of law if the nonmoving party fails to make a sufficient showing of an essential element of the case to which the nonmoving party has the burden of proof." *Melton v. Teachers Ins. & Annuity Ass'n*, 114 F.3d 557, 559 (5th Cir. 1997). The evidence is viewed in the light move favorable to the nonmovant but the nonmovant must "set forth specific facts to establish that there is a genuine issue for trial, but where the evidential submissions lack probative value as to a genuine issue, summary judgment is appropriate." *Id.* "A summary assertion made in an affidavit is simply not enough evidence to raise a genuine issue of material fact." *Id.* Nor may a summary judgment motion be defeated by "unsupported allegations or affidavit or deposition testimony set-

ting forth ultimate or conclusory facts and conclusions of law." *Clark v. America's Favorite Chicken Co.*, 110 F.3d 295, 297 (5th Cir. 1997).

III. CLAIMS UNDER THE AMERICANS WITH DISABILITIES ACT

In the motion for partial summary judgment, defendants Local and Ray B. Wooster contend that plaintiff cannot establish a claim under the Americans with Disabilities Act (ADA) because (1) defendants had no knowledge of any "disability" of plaintiff at the time of his termination and (2) plaintiff had no "disability for ADA purposes. Defendants also claim that defendant Wooster cannot be individually liable under the ADA. In response to the motion, plaintiff claims (1) the motion is premature because discovery has not been completed; (2) defendants have misstated the legal basis for an ADA claim in their motion; (3) defendants' claim of no knowledge of plaintiff's disability is disputed; (4) defendants have misstated the law applicable to chronic psychological impairments, and (5) defendants' claim that plaintiff was not disabled within the context of his workplace is also disputed.

A. Motion for Summary Judgment Premature

Plaintiff contends defendants' motions are premature because discovery has not been completed. Although that was a true statement at the time the responses to defendants' motions were filed, this Court has held off ruling on the motions until after both the discovery deadline and dispositive motions deadline have run.[1] Therefore, the Court finds that

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[1] On January 2, 1997, a Rule 16 conference was held. After this conference,

a ruling on the motions is no longer premature.

B. Legal Basis for an ADA Claim

Plaintiff argues defendants have misstated the basic elements of an ADA claim by stating the three-part definition of disability in the conjunctive instead of the disjunctive. Defendants have remedied any misinterpretation of the elements in their reply to plaintiff's response.

Under the ADA, discrimination is prohibited "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *Dutcher v. Ingalls Shipbuilding,* 53 F.3d 723, 725 (5th Cir. 1995) (quoting 42 U.S.C. § 12112 (a)). As used in the ADA, "disability" means:

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; *or*

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footnote 1 continued

the Court issued an order extending the discovery deadline until March 31, 1997 (*see* docket #34). The order further provided that "[a]lthough the dispositive motions deadline is not being extended at this time, the parties are advised that they may file supplemental motions should discovery provide additional grounds or information." On April 16, 1997, the Court granted the joint motion to extend the discovery deadline to June 30, 1997 (*see* docket #54). No request was received to extend the discovery or dispositive motions deadlines, and the Court has allowed sufficient time for the filing of any supplemental motions after the conclusion of discovery.

(C) being regarded as having such an impairment.

Id. (emphasis added).

According to plaintiff, he met with defendant Wooster on July 29, 1991, to advise him that because of the stress plaintiff had been under because of the news Plaintiff's wife wanted a divorce and his counselor's advice regarding same, plaintiff needed to take time off. Plaintiff was given time off beginning on July 31, 1991. Plaintiff received a letter dated October 9, 1991, from Richard L. Elliott, Executive Assistant to the President, concerning plaintiff's leave of absence. The letter requested a doctor's statement supporting the disability requiring plaintiff to be off of work and to include the anticipated date of return to full duty. Plaintiff responded to Mr. Elliott on October 15, 1991, advising him of plaintiff's counselling session in Houston and the advice he was given to take an extended "leave of absence due to work-related as well as family-related stress." Plaintiff closes this letter by stating he was eagerly awaiting his return to active duty but "to return prematurely would retard my recovery and could be a threat to my very life."

Mr. Elliot also received letters from various physicians concerning the plaintiff. In a letter dated October 16, 1991, Dr. Trevino stated that plaintiff was in good physical condition but his mental status "showed Depression and Anxiety secondary to intense stress over his divorce." Dr. Trevino advised that a more reasonable time frame for plaintiff to return to work would be at the first of the new year when he anticipated Mr. Comeaux would be off all medications. Plaintiff's clinical psychologist advised Mr. Elliot in a letter dated October 19, 1991, that he had been seeing the plaintiff in

counseling since August 6, 1991 for the

> alleviation of anxiety and depression resulting from stress related to severe marital difficulties that have been seriously compounded by his past excessive work history. The marital difficulties have not resolved favorably, and he is currently in the midst of divorce proceedings. His hearing is tentatively set for November 7, 1991. I would definately [sic] not recommend he return to work until at least that time, and would recommend his not returning to full time work until the beginning of 1992. I would also recommend that, in view of his work history, i.e. his tendency to work excessively or "workaholism", that he attempt to work no more than 45 hrs/week until his life is sufficiently stabilized, and his work habits sufficiently self-regulated.

Acknowledging receipt of Dr. Trevino's letter, defendant Wooster sent a letter to plaintiff dated October 21, 1991. In that letter, defendant Wooster inquired whether plaintiff should be filing a claim under the Worker's Compensation Act because plaintiff's letter implied that an extended leave of absence was needed due to work-related stress. Plaintiff was advised that an extension of leave must be requested if additional time was needed.

Plaintiff responded to defendant Wooster's letter and requested an extension of his leave of absence under the sick leave policy until he was released by his doctor to return to active duty. In his letter dated October 26, 1991, plaintiff wrote he had been advised by Dr. Trevino and his clinical psychologist that he should be sufficiently recovered and off

his medication by the first of the New Year. Plaintiff anticipated returning to active duty on the first work day of 1992, providing he had been released by Dr.Trevino. In an attempt to clear up any ambiguity concerning his situation plaintiff explained as follows:

> I believe you are in possession of letters from Drs. Trevino and Ehrisman regarding my situation. I believe they stress that my treatement [sic] has been for alleviation of anxiety and depression resulting from stress related to severe marital difficulties. And yes, part of the cause of those marital difficulties was the excessive work history which severely handicapped my relationship with my wife. While working primarily with Dr. Ehrisman for the relief of my depresion, we are attempting to make significant and imperative changes in my work lifestyle in order to make me a better, more well-rounded and balanced individual, and, to accomplish this, requires, in part, dealing with work-related stress. However that is only part of the counseling process. The depression, itself, in not work-related.

Plaintiff advised he had begun a 12-step program for long-term solution to my problem with workaholism. Thereafter, in a letter dated December 27, 1991, Dr. Trevino advised Mr. Elliott that Mr. Comeaux was seen in his office that day and "[h]e is cleared for full unrestricted return to duty. He may return to full time duty as of January 2, 1992. Plaintiff did return to work as scheduled but maintains he was still under the 45 hour/week restriction.

Given this background, the Court finds that plaintiff's

condition does not fit within the meaning of disability under the ADA. Although plaintiff does not state which of the three-part definition he relies on to prove disability under the ADA, the evidence does not support a finding that his impairment substantially limited one or more of the major life activities. *See Still v. Freeport-McMoran, Inc.*, 120 F.3d 50, 52 & n.1 (5th Cir. 1997) (when major life activity at issue is working, term "substantially limits" means "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working."); *see also Kolpas v. G.D. Searle & Co.*, 959 F. Supp. 525, 529-30 (N.D. Ill. 1997) ("inability to work more than forty-hours per week by itself does not constitute a substantial limitation on the major life activity of working"; "the ADA does not protect people from the general stresses of the workplace"); *Duff v. Lobdell-Emery Mfg. Co.*, 926 F. Supp. 799, 808 (N.D. Ind. 1996) (inability to work more than normal 40-hour week, without more, not substantial limitation on major life activity of working). Likewise, in order to fall under the two remaining portions of the three-part definition of disability under the ADA, the individual must have a record of an impairment that substantially limits a major life activity or be a person regarded by an employer as having an impairment that substantially limits a major life activity. *See Shpargel v. Stage & Co.*, 914 F. Supp. 1468, 1474 (E.D. Mich. 1996) (to have a record of such impairment "means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities"; to be regarded has having such an impairment means (1) impairment does not

substantially limit major life activities but is treated by a covered entity as constituting such a limitation; (2) impairment that substantially limits major life activities only as a result of the attitudes of others toward the impairment; or (3) has none of the impairments defined in the section but is treated by employer as having substantially limiting impairment). No evidence has been presented to support a finding under either of these provisions.

IV. CLAIMS UNDER THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT

Plaintiff contends the defendants unlawfuly terminated him from employment and then failed to recall him, in substantial part because of his exercise of protected free speech rights, specifically including campaigning for the office of President of defendant Local, all in violation of plaintiff's rights under 29 U.S.C. § 411 (a) (1) and (2). Defendants contend that plaintiff's termination from his position as a business agent does not fall within the purview of the Labor Management Reporting and Disclosure Act (LMRDA). In suport of their contention, defendants rely on *Finnegan v. Leu,* 456 U.S. 431, 436-37 (1982), in which the Court stated:

> It is readily apparent, both from the language of these provisions [29 U.S.C. §§ 411 (a) (1) and (2)] and from the legislative history of Title I, that it was rank-and-file union members—not union officers or employees, as such—whom Congress sought to protect.
>
> [D]ischarge from union employment does not impinge upon the incidents of union membership, and

> affects union members only to the extent that they happen also to be union employees.

Defendants maintain plaintiff was laid off because of economic conditions requiring his termination, and the failure to recall after plaintiff began organizing political opposition to the incumbent administration falls within the rule set forth in *Finnegan*.[2] *Id.* at 442 ("whatever limits Title I places on a union's authority to utilize dismissal from union office as a part of a purposeful and deliberate attempt ... to suppress dissent withing the union,' it does not restrict the freedom of an elected union leader to choose a staff whose views are compatible with his own").

In response, plaintiff argues the *Finnegan* principles do not apply because the letter to plaintiff informing him of the layoff cited economic reasons not differences of ideology between plaintiff and defendant Wooster.[3] Plaintiff main-

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[2] At his deposition, defendant Wooster testified that he was the sole decisionmaker in deciding to lay off the plaintiff. He testified that he considered the following factors in making his decision: (1) plaintiff was probably the least experienced business agent; (2) they way he did seniority, plaintiff was on the bottom of the list; (3) "you're constantly having to argue with his or he's his constantly not — having his own agenda and not wanting to follow the program or the agenda that's laid out. And eating up time with it"; and (4) plaintiff being the highest paid person on staff with the exception of defendant Wooster and the secretary treasurer.

Defendant Wooster also testified that plaintiff was not recalled because plaintiff was ineligible for the program which hired additional employees after plaintiff's lay off. In addition, after the lay off, plaintiff started distributing handbills attacking Mr. Wooster's leadership of the union. Mr. Wooster testified that as a member, plaintiff attended the meetings and could do what he wanted, but could no longer expect him to do plaintiff any favors.

[3] The letter read as follows:

As discussed at staff meeting during the last several months, Local 455

tains the *Finnegan* case does not apply to protect an out-going officer's right to terminate a prespective opponent to his hand-picked successor who has not yet won election and the subsequent right to practive patronage. In reply to these arguments, defendants maintain the termination was for economic reasons but contend that plaintiff's employment as a union official is not protected by the LMRDA's "Bill of Rights." As to plaintiff's argument that *Finnegan* does not apply to protect an out-going officer's right to terminate a prospective opponent, defendants point first to the fact that plaintiff has cited no authority for his proposition and second that neither the "Bill of Rights" nor *Finnegan* speak to the timing of any adverse employment actions. *Finnegan* is relevant for the proposition that "elected union officials have the right to choose a staff whose views are compatible with their own."

As set forth in *Adams-Lundy v. Association of Prof. Flight Attendants,* 731 F.2d 1154, 1156 (5th Cir. 1984):

> The primary objective of the LMRDA is that of 'ensuring that unions would be democratically governed and responsive to the will of their memberships.'

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footnote 3 continued

is being forced to reduce our servicing staff and office staff due to the extreme financial burden placed on this Local Union because of the AppleTree situation.

After reviewing all factors, I regret to inform you that you will be layed-off, effective October 3, 1992. You will remain on a recall list for six months, and will be considered for rehire, along with others, if a position for a full-time Business Representative becomes available.

Thank you for you past service to this Local Union and Good Luck in the future.

> Rank and file union members are granted rights under the Act to protect them from abuses of power by the union leadership. Union leaders, *per se*, are not themselves a protected class under this Act, except that they, too, may not be deprived of the basic right attending on union membership. (citations omitted.)
>
> Under sections 101 (a) (1) and (a) (2) of the LMRDA, 29 U.S.C. §§ 411 (a) (1) and (a) (2), members of labor organizations have the right to vote in union elections and to express independent opinions on matters of concern to the union.

Plaintiff does not claim that he was denied the right to vote or express his opinions on matters of concern to the union as a rank-and-file member. In fact, plaintiff testified that he ran for president and voted in the election—he stated he agreed to and voted for Bill Hopkins who was not the hand-picked successor of defendant Wooster and who ultimately won the election.

Therefore, for the reasons stated above and those contained in defendants' motion and reply, and after review of the record as presented, defendants' motion for partial summary judgment (docket 33) is GRANTED.

V. CONSPIRACY CLAIMS IN VIOLATION OF 42 U.S.C. § 1985 (3)

In his complaint, plaintiff maintains defendant Wooster conspired with other employees and agents of defendant Local and defendant International to injure plaintiff in his employment relationship. The acts committed in furtherance of the

conspiracy included terminating plaintiff in a false lay off and failing to recall him. plaintiff claims his rights were violated under 42 U.S.C. § 1985 (3).[4]

Defendants Local and Wooster seek dismissal pursuant to FED. R. CIV. P. 12 (b) (6) of plaintiff's conspiracy claim under 42 U.S.C. § 1985 (3). Defendants contend plaintiff must allege and prove "some racial or perhaps otherwise class-based discriminatory animus behind the conspirators' action." Plaintiff acknowledges that he does not allege any form of race based discrimination but relies upon his rights of union free speech and association protected by the "Bill of Rights" to stand for election to union office.

The purpose of enacting section 1985 (3) was to "protect the civil rights of individuals from 'class-based, invidiously discriminatory animus behind the conspirators' action.' " *Liberty County Officers Ass'n v. Stewart,* 903 F. Supp. 1046, 1056 (E.D. Tex. 1995). In order to prove a private conspiracy under this section, a conspiracy of class based discrimination must be shown which is " 'aimed at interfering with rights' that are 'protected against private, as well as official encroachment.' " *Id.* From a review of the complaint, plaintiff makes no claim of "class based discrimination" but claims a conspiracy to "injure plaintiff in his employment relationship" and in violation of "plaintiff's rights." Private disputes of "feuds" have been found to be outside of the in-

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[4] Although the complaint refers to § 1985 (2), counsel for defendant International noted at the last status conference that (2) was a typographical error and should reflect (3) the "private" conspiracies subsection. Plaintiff moved to amend to correct this error in his response in opposition to the motion for partial dismissal (docket #49), and it is so granted. Defendants address subsection (3) in their reply to plaintiff's response (docket #52).

tended scope of § 1985 (3). *Runyon v. United Brotherhood of Carpenters and Joiners of America, AFL-CIO,* 554 F. Supp. 859, 863 (D. Col. 1982). Moreover, because no violation of the LMRDA has been found, there can be no § 1985 (3) conspiracy regardless of whether plaintiff's rights have been affected. *See McLellan v. Mississippi Power & Light Co.,* 545 F.2d 919, 925 (5th Cir. 1977) ("there can only be a deprivation of the rights of a plaintiff when the action of the defendants is *otherwise* illegal. If the defendants have not conspired to act contrary to law, an object of a section 1985 (3) conspiracy has not been made out and the section is inoperable, regardless of whether the legal rights of the plaintiff are somehow affected.")

Therefore based on the foregoing and the authorities cited by defendants in their motion and reply, defendants' motion to dismiss (docket #35) is GRANTED.

VI. LIABILITY OF DEFENDANT INTERNATIONAL FOR DEFENDANT WOOSTER'S ACTIONS

Defendant International filed a separate motion for summary judgment concerning plaintiff's allegations under the LMRDA and § 1985 (3). International contends there is no evidence by the plaintiff to indicate any effort by the International to authorize, ratify or participate in defendant Wooster's employment decisions. Attached to its motion are the affidavits of former and current presidents specifically denying any involvement in plaintiff's lay off. In addition, International has provided a copy of its Constitution which provides that local presidents make the employment decisions for the local unions and may not obligate the International

Union for any contractual or debt obligation.

Based on the record presented and because the Court has dismissed plaintiff's claims under the LMRDA and § 1985 (3) as to defendants Local and Wooster, plaintiff's claims against defendant International are also dismissed. Therefore, defendant International's motion for summary judgment (docket #37) is GRANTED.

ORDERED, SIGNED AND ENTERED this *30th* day of Sesptember, 1997.

/s/ Fred Biery

FRED BIERY
UNITED STATES DISTRICT JUDGE

APPENDIX 3

900576

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO RIO DIVISION

FILED
SEP 30 1997

ROBERT L. COMEAUX	:	
	:	
Plaintiff,	:	
	:	
VS.	:	CIVIL ACTION
	:	NO. SA-94-CA-0771
UNITED FOOD AND COMMERCIAL WORKERS LOCAL UNION NO. 455, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL AFL-CIO, CLC; and RAY B. WOOSTER,	:	
	:	
Defendants.	:	

JUDGMENT

On this date came on to be considered the Judgment to be entered in the above-styled and numbered cause.

Consistent with the Order filed in this cause on this same date.

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the motions for summary judgment (docket #s 33 and 37) and the motion for dismissal (docket # 35) are GRANTED such that all of plaintiff's claims herein are DISMISSSED. Motions pending, if any, are hereby DENIED.

ORDERED, SIGNED and ENTERED this *30th* day of September, 1997.

/s/ Fred Biery

FRED BIERY
UNITED STATES DISTRICT JUDGE

APPENDIX 4

900604

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED
DEC 29 '97

ROBERT L. COMEAUX	:	
	:	
Plaintiff,	:	
	:	
v..	:	**CIVIL ACTION**
	:	**NO. SA-94-CA-0771**
UNITED FOOD AND COMMERCIAL WORKERS LOCAL UNION NO. 455 UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL AFL-CIO, CLC; and RAY B. WOOSTER,	:	
	:	
Defendants.	:	

NOTICE OF APPEAL

TO THE HONORABLE JUDGE OF SAID COURT:

Notice is hereby given that Robert L. Comeaux, Plaintiff pro

se in the above-styled case, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Court's Order on Plaintiff's Motion for New Trial signed and entered November 25, 1997.

Respectfully Submitted

BY: /s/ Robert L. Comeaux

ROBERT L. COMEAUX, Plaintiff, pro se
702 West French Place
San Antonio, Texas 78212-3636
(210) 732-7789
(210) 732-7786 Facsimile

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing motion has been forwarded to

Eric H. Nelson, Esq.
3303 Main Street, Suite 300
Houston, Texas 77002

Patrick M. Flynn, Esq.
1235 North Loop West, Suite 1235
Houston, Texas 77008

on this *24th day of December, 1997.*

/s/ Robert L. Comeaux

APPENDIX 5

900344

CHRONOLO WPS Comeaux Chronology

August 1992

Comeaux had met with Sandi Borowicz regarding starting a staff union for Local #455. Comeaux also spoke with Sandi's friend Joe from Detroit who was assisting the Local on the strike who had been instrumental in their forming a union at his Local.

Protection from political reprisal before the election next year was a concern of everyone involved.

August 30, 1992 Comeaux met Greg Schulze at Mathias' Pub in Houston to hear Mark Wallney to play guitar and sing. Comeaux tells Schulze that Comeaux will run for president of Local #455. Schulze tells Comeaux that he is already pledged to support Richard Elliott.

He says his rationale for supporting Elliott is to avoid divisiveness. Comeaux said the local was divided due to inept leadership and greedy officers, that if people of vision and experience don't continue to offer themselves for office, the local will continue to go downhill.

Comeaux said that people with leadership skills, experience, and vision had to be willing to risk their jobs on behalf of the members and that Greg was taking the coward's way out by supporting the status quo. He told Greg that his conscience would bother him the entire campaign, and he would have to learn to live with himself.

Late August, 1992 Comeaux saw a memo from Wooster to the servicing staff (business agents) offering to waive the $23 initiation fee for new member ($1wk for 23 weeks) for any new member who joins the ABC—Active Ballot Club during this limited time offer. If, as Wooster claims, the Local is broke and that is why I had to be laid off, then why did they take the fiscally irresponsible step of lessening the operating capital of the Local in exchange for increasing the political fund of the Local?

The political fund was taken out either in January, or in June and $10 would be deducted once and only once. Potential members signed in August might have paid their $23 initiation fee (or part of it) by the end of the year, but might have quit before the $10 was deducted in January.

Even if they waived the fee for the new members, the Local was required to pay an initiation fee to the Interna-

tional, so waiving the fees hurt the Local by having less revenue coming in while not reducing the revenue going to Washington.

The reality is that the Local was sacrificing operating funds for political funds.

September 12, 1992 Saturday. Comeaux is in the office to pick up supplies for use on picket line and is dressed in shorts and t-shirt. He had not been invited into the office for a meeting, but those staff members who were serving as business representatives were all in the office and all invited to the meeting prior to its occurrence.

Wooster came yelling down the hallway for all representatives to get into the meeting. Since I had not been invited, I did not think he was speaking to me. Then he came down the hall and said: "Comeaux, last time I checked you were on the payroll. Get your butt in here." All others were in business attire suitable for servicing the stores.

Wooster again reiterated that he would be retiring and again announced his support for Richard Elliott. He stated that he hoped that Richard would have no opponent because the local could be divided like Kansas City was divided.

He mentioned that he had staff cutbacks, and he didn't see any additional cuts in the foreseeable future. He stressed the importance of servicing the stores and continuing to sign up new members. He said that your family has to understand the demands of your job or to hell with it.

He complained that some staff members had not yet contributed to the Hurricane Andrew fund for our members who had lost everything. He said he didn't understand why those of us with good staff jobs had to be asked a second time—wouldn't we want someone to help us if the table were turned. Then he issued a very thinly-veiled threat: "Those of you who cannot find $100 to contribute to this good cause will wish you could have found the money if several months down the road the International Union decided to end their subsidy."

Comeaux had been asked by Roy Davila to contribute, and told Roy that he just couldn't contribute at this particular time, citing divorce expenses, moving expenses, daughters college and private school tuition, the extra money he had to spend on moving, etc.

9/13/92

Before working picket line, Comeaux wrote a letter to Wooster taking issue with the misplaced priority of job over family expressed by Wooster in the September 12, meeting and citing his

status as a recovering workaholic. After walking picket line, he revised the letter. In the evening, he called Kari and discussed the letter with her, and she encouraged Comeaux to deliver the letter, even after acknowledging that the letter might get him fired.

(Kari and her son Tyler had moved into Bob's house with him. Bob was unable to help them in the move because he was in Houston where he was forced to work several weeks without a day off or a return to his domicile. The Local would have a Houston representative — Tom Edwards — service San Antonio stores and stay in a hotel while the Local saying we had to cut costs. Edwards was home every weekend. Comeaux was the only representative who was forced to spend these long days and nights away from his domicile. Mike Podkanowicz was gone a lot, too, but much of that was voluntary. All the while, Comeaux was not supposed to work over 45-hours week, but he knew he would be fired if he complained, and he had always pulled way more than his load.

September 14, 1992 Comeaux meets with Elliott on two issues.

1) General grievance filed by Comeaux

on behalf of 29 named and numerous unnamed clerks concerning calculation of their wages under the minimum wage increases. Comeaux has made it clear to Elliott and to Roy Davila (Comeaux supervisor) that Comeaux needs to sign off on any resolution to this grievance as is standard practice in the local. Elliott agrees to meet with Comeaux on 9/16 between Comeaux's picketing shifts (morning shift — 9 - 11, afternoon shift (3 - 7)) to review file with Comeaux before Elliott signs off on it. Elliott says he is ready to resolve the grievance.

2) Letter of disagreement with Wooster's remarks in 9/12/92 meeting. Comeaux gives Wooster's letter in unsealed envelope to Elliott and Comeaux leaves. A few minutes later, Elliott comes out and asks Comeaux if it's okay if Elliott reads the letter. Comeaux tells Elliott he doesn't care if Elliott publishes it. As he leaves the office, Elliott can be seen by Comeaux reading the letter while shaking his head.

September 14, 1992 At 1 or 2 PM that same day, there was a scheduled Executive Board meeting to be chaired that day by Elliott.

September 14, 1992 At 7:30 p.m. that day was the regular quarterly meeting of the membership at the same Holiday Inn Express where

Comeaux was staying. On Saturday at the meeting, Comeaux was told that it was not necessary to be at the meeting, but he attended anyway.

The minutes of that day's executive board meeting were read and approved. Those minutes did not contain a single mention at this meeting of any additional layoffs. Comeaux subsequently asked for and received permission to review the minutes of the meeting and verified no mention of layoffs.

September 15, 1992 Tuesday. Comeaux was removed from coordinating picket line and told he needed to walk picket by himself at Clear Lake because Paul Cloer, an International Staff rep. had just fired all of the pickets. Comeaux immediately believes this is retaliation for the letter he wrote. Comeaux believes he will be fired for his political beliefs and seeking to enforce the restriction meant to protect his health.

Comeaux reminds Roy Davila that "today's payday" meaning the picketers are expecting Comeaux or someone to deliver their picket checks. Davila allows Comeaux to deliver their checks — over 200

miles of driving — with the understanding that tomorrow, Comeaux will walk the picket line in Clear Lake City.

September 16, 1992 Wednesday. Comeaux was assigned to walk picket line by himself in Clear Lake City. He was notified of a change in picketing schedule that morning with new hours being from 9:30 - 11:30 am, and 2:30 - 6:30 pm. Clear Lake City is about an hour drive from Local #455 where Comeaux is scheduled to meet with Elliott between shifts on the issue of the Kroger grievance. Thus, Comeaux could be in the office from about 12:30 - 1:30 only, then would have to go back to the picket line.

About noon, Comeaux calls Elliott from Armand Bayou Park pay phone to let him know about the insufficient time to drive in to review the file. Comeaux offered to come into the office that evening to review the file and have it ready for Elliott the next morning:

Elliott: "Bob, I resolved those grievances last week."

Comeaux: "What? Don't you remember our conversation on Monday morning that we would meet today on this grievance?"

Elliott: Are you challenging my

right to resolve those grievances?"

Comeaux: (Felt he was being lulled into an insubordination trap, put up his defenses: "No, Richard, but I've made it clear to you and to Roy that I wanted to be consulted before we resolved this grievance.") (That was standard operating procedure.)

Elliott: Made a sttement about how many years he has been resolving grievances.

Comeaux: "Richard, I've said all along that I could be wrong on this grievance, but until somebody sits down with me and explains why I'm wrong, I have to pursue it. If someone shows me how I am wrong, then I'll sit down with the 29 members and explain to them that I was wrong. What's the problem with that? That's what we talked about on Monday. Why didn't you tell me then?"

September 16, 1992 1:15 pm. Comeaux is eating at Colosseum Italian Restaurant in Clear

Lake City when he gets a beep. Becky tells him that Wooster has just returned and wants to meet with Comeaux at 2 pm.

Comeaux tells her he still has a few checks for the fired pickets, and they are expecting to get those checks from 3 - 5 pm, that they complained the previous day when the checks were not available to them. Comeaux asked for instructions and was put on hold. Comeaux was instructed to go to the picket line until Roy Davila arrived and give the checks to him, then head to the office.

Davila drives up at 2:45 pm and asks Comeaux "Why are you leaving the picket line?" Comeaux replies that they just called him in to the executive office. Davila asks what for. Comeaux replies: "Don't you know, Roy, they're going to lay me off!" (Comeaux trained Roy back in 1972, and though they have differences, they are both friends.)

Roy is on the executive board as recorder. He said: "There's no more layoffs!" Comeaux says: "Yeah there are. You watch."

September 16, 1992 3:30 pm. Comeaux gets to the office. Wooster style is same as day he called Comeaux in after Comeaux showed

support for Steve Marak — Head cocked to the side and downwards, no eye contact, talks out of side of mouth: "Well, Bob, we've been telling staff for several months there will be layoffs. I have a letter for you."

Bob shows no emotion, having prepared himself during the hour ride for the meeting.

Wooster said: "As an International Vice President, I have taken the liberty to ask the International if they have any openings. The International has imposed a freeze on hiring until after the International Union convention [in Toronto] next year. I would be happy to give you a letter of recommendation."

Wooster said Comeaux could either leave that day or stay overnight and he would have Greg Schulze drive him to San Antonio. Comeaux opts to stay that night.

APPENDIX 6

900443

UFCW
Local Union No. 455, AFL-CIO

September 16, 1992

Mr. Bob Comeaux
702 W. French Place
San Antonio, TX 78212

Dear Bob:

As discussed at staff meetings during the last several months, Local 455 is being forced to reduce our servicing staff and office staff due to the extreme financial burden placed on this Local Union because of the AppleTree situation.

After reviewing all factors, I regret to inform you that you will be layed-off, effective October 3, 1992. You will remain on a recall list for six months, and will be considered for rehire, along with others, if a position for a full-time Business Representative becomes available.

Thank you for your past service to this Local Union and Good Luck in the future.

Sincerely,

/s/ Ray B. Wooster
Ray B. Wooster
President

RBW:bc

DEPOSITION EXHIBIT
12

APPENDIX 7

REBUILD
TO FORM A MORE
PERFECT UNION

TIRED OF GETTING YOUR UNION BUTT KICKED?

That's the substitle of an article inside from the Texas AFL-CIO *Labor News.* On the right side of the page is the REBUILD Committee response.

The Wooster-Elliott philosophy is the "servicing model" — one of control of the UFCW membership. The REBUILD Committee philosophy is the "organizing model" — one of empowering the membership through Reforming, Educating, Building, Uniting In Leadership Development.

Make no mistake about it: Wooster and Elliott do not advocate change — they like things just the way they are. Meanwhile, the union gets weaker and weaker.

When the REBUILD Committee advocated changes in the bylaws, Wooster-Elliott send business representatives to stores on a Sunday morning to try to squash the democratic reforms. Staff even went to some members' homes to try to collect the petitions.

When the REBUILD Committee raised key questions about Wooster-Elliott's handling of the AppleTree strike disaster, Wooster-Elliott called a meeting of AppleTree strikers, the first meeting in six months of picketing!

When REBUILD Committee members were visiting with AppleTree strikers, staff members on union time and in union vehicles followed the Committee member for over 20 miles

And it was because of our leadership in the fight for reforms that I was "laid off" in September, despite 20 years of service to the UFCW and the AFL-CIO.

But, because of a growing desire by rank-and-file members to "take back our Union!", the changes we seek are becoming possible. If you agree that it is time for rank-and-file members to build a powerful union — *to form a more perfect union* one that is truly owned by the membership, then we invite you to join the REBUILD Committee by filling out the form on the back of this brochure and mail it in today.

Thank you for your support! Send us your ideas on how we can make our union stronger.

In Solidarity,

/s/ Bob Comeaux

Bob Comeaux, Chair
REBUILD Committee

opeiu #120

afl-cio

APPENDIX 8

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ROBERT L. COMEAUX	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION
	§	NO. SA-94-CA-0771
UNITED FOOD AND COMMERCIAL WORKERS LOCAL UNION NO. 455 UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL AFL-CIO, CLC; and RAY B. WOOSTER,	§	

AFFIDAVIT

CLARA JEAN BANE BEING FIRST DULY SWORN SAYS:

1. MY NAME IS CLARA JEAN BANE. MY ADDRESS IS 3606 LAKE RIDGE BEND SPRING; TEXAS 77380-2430.

2. I AM OVER TWENTY ONE YEARS OF AGE AND I UNDERSTAND THAT I AM UNDER OATH.

DEPOSITION EXHIBIT
1

3. I AM PRESENTLY UNEMPLOYED. MY LAST EMPLOYER WAS THE UNITED FOOD AND COMMERCIAL WORKERS LOCAL UNION No. 455, AFL-CIO-CLC. I WAS LAST EMPLOYED BY LOCAL 455 FROM JANUARY 3, 1994 TO APRIL 10, 1995.

4. FROM JANUARY 3, 1994 TO A DATE IN JUNE OF 1994 I WAS EXECUTIVE SECRETARY TO THE NEWLY ELECTED PRESIDENT OF LOCAL 455, MR. BILL HOPKINS. I WAS PAID $550.00 PER WEEK AS A SALARY.

5. I TOOK MR. HOPKINS CALLS, MADE HIS TRAVEL ARRANGEMENTS, HANDLED HIS APPOINTMENTS, SET UP HIS FILES, AND SERVED AS HIS PRIMARY CONTACT WITH THE LOCAL'S CLERICAL STAFF. I WAS HIS PERSONAL EXECUTIVE SECRETARY.

6. I WAS OFFERED THE JOB OF BILL HOPKINS' EXECUTIVE SECRETARY AFTER THE LOCAL ELECTION BALLOTS WERE COUNTED IN NOVEMBER 1993. MR. HOPKINS MADE THE OFFER TO ME AT MY HOUSE.

7. ON THE EVENING MR. HOPKINS OFFERED ME A JOB AT MY HOUSE, ROBERT COMEAUX WAS THERE. BOB HAD BEEN STAYING THERE AND USING MY PHONES, COMPUTER AND FAX MACHINE TO ASSIST BILL HOPKINS WITH HIS ELECTION CAMPAIGN, AS WELL AS TO COMMUNICATE WITH HIM AT MY HOME.

8. MR. HOPKINS SPOKE TO MR. COMEAUX BEFORE HE OFFERED ME A JOB. AFTER MR. COMEAUX WAS FINISHED, MR. HOPKINS THANKED ME FOR MY EFFORTS, TOLD ME HE WOULD NEED AN EXECUTIVE

SECRETARY AND OFFERED ME THE JOB. MR. HOPKINS TOLD ME THAT HE HAD WORKED THINGS OUT WITH BOB COMEAUX AND THAT MR. COMEAUX WOULD BE COMING BACK TO WORK FOR THE LOCAL AS PART OF THE NEW TEAM. HE SAID THAT THINGS WERE GOING TO BE ROUGH. EVERYONE WOULD HAVE TO LEARN A NEW JOB AND COOPERATE WITH EACH OTHER. IN SPECIFIC REFERENCE TO MR. COMEAUX, MR. HOPKINS AGREED WITH ME THAT UNDER THE PREVIOUS ADMINISTRATION, MR. COMEAUX HAD BEEN WRONGED WHEN HE WAS TERMINATED. BRINGING MR. COMEAUX BACK WAS PART OF BILL HOPKINS' OVERALL PLAN TO CREATE A EFFECTIVE TEAM AND GET THE LOCAL BACK ON TRACK.

9. SEVERAL WEEKS AFTER I STARTED WORKING FOR THE LOCAL IN JANUARY 1994, I ASKED MR.HOPKINS WHY MR. COMEAUX HAD NEVER BEEN REHIRED. MR. HOPKINS SAID THAT MR. COMEAUX HAD RENEGED ON A DEAL TO RETURN TO WORK AND WAS NOW DEMANDING SO MUCH MONEY THAT THE LOCAL WOULD GO OUT OF BUSINESS IF MR. COMEAUX TERMS WERE MET. HE ALSO SAID, "SOONER OR LATER HE'LL RUN OUT OF MONEY AND HAVE TO GO TO WORK".

10. I HAD PREVIOUSLY WORKED FOR LOCAL 455 FROM MAY OF 1990 THROUGH AUGUST OF 1992. AT THAT TIME THE PRESIDENT OF LOCAL 455 WAS RAY B. WOOSTER. AT THE TIME I WAS ALLEGEDLY "LAID OFF" (IN AUGUST 1992), I WAS ON MEDICAL LEAVE RECOVERING FROM SURGERY ON A HERNIATED DISK. I WAS NOT THE LEAST SENIOR STAFF MEMBER

AND SEVERAL JUNIOR MEMBERS OF THE STAFF WERE RETAINED, I WAS GIVEN APPROXIMATELY TWO WEEKS NOTICE OF THE "LAY OFF", WHICH TERMINATED MY DISABILITY PAY (PARTIAL SALARY). I WAS TOLD THE LAY OFF WAS TEMPORARY AND THAT THE LOCAL WOULD CONTINUE TO PAY FOR MY HEALTH INSURANCE.

11. PRIOR TO JULY 31, 1991, ROBERT COMEAUX WAS A LOCAL 455 MANAGER. HE WAS THE ORGANIZING DIRECTOR AND I WAS BY THEN A BUSINESS AGENT. AT A STAFF MEETING WITH ALL THE ORGANIZING AND SERVICING STAFF PRESENT JULY 31, MR. COMEAUX MADE AN ANNOUNCEMENT HE HAD BEEN MEDICALLY ADVISED TO TAKE LEAVE. HE WAS TAKING LEAVE TO START TO RECOVER FROM WORKAHOLISM. I WAS SURPRISED THAT MR. COMEAUX WAS TAKING THE ADVICE, BUT NOT SURPRISED THAT HE HAD BEEN DIAGNOSED AS A WORKAHOLIC. I TYPICALLY WORKED IN EXCESS OF 60 HOURS PER WEEK AND HE WORKED NOTICEABLY MORE.

12. SOME OF THE STAFF WERE UNSYMPATHETIC TO MR. COMEAUX'S PERSONAL PROBLEMS. THEY THOUGHT HE SHOULD BE ABLE TO HANDLE HIS DIVORCE WITHOUT TAKING OFF FROM THE USUAL PACE. LOCAL 455 EXPECTED ALL SERVICING STAFF TO WORK MORE THAN 55 HOURS PER WEEK. TYPICAL WORK HOURS FOR SERVICING STAFF WERE 9:00 AM TO 9:00 PM, FIVE OR MORE DAYS PER WEEK. THE COMMENTS OF PRESIDENT RAY WOOSTER ABOUT THE WORK LOAD WERE, "THIS IS WHAT IS

REQUIRED, IF YOU CAN'T DO IT, WE WILL REPLACE YOU." STATEMENTS TO THIS EFFECT WERE MADE ON A REGULAR BASIS BY MR. WOOSTER AND HIS EXECUTIVE ASSISTANT, RICHARD ELLIOT, AS WELL AS SENIOR STAFF REPRESENTATIVES.

13. I HAD A PRIVATE CONVERSATION WITH LOCAL PRESIDENT RAY WOOSTER WHILE MR. COMEAUX WAS ON MEDICAL LEAVE. I WAS TALKING TO MR. WOOSTER ABOUT A PERSONAL FAMILY MATTER. MR. WOOSTER CLEARLY ADVISED ME NOT TO TAKE OFF WORK. HE SAID THAT I COULD WORK IN THE OFFICE AND SUGGESTED TO ME THAT MR. COMEAUX DIDN'T NEED TO BE ON LEAVE FROM WORK BECAUSE OF A PERSONAL PROBLEM. (GOING THROUGH A DIVORCE). HE DIDN'T MENTION THE WORKAHOLISM. HE SPOKE SARCASTICALLY AND SUGGESTED TO ME THAT HE FELT THAT MR. COMEAUX WAS ABUSING THE SYSTEM BY TAKING OFF.

14. ON DECEMBER 8, 1992, I SPOKE TO GREG SCHULZE - A SENIOR REPRESENTATIVE AT THAT TIME. THE END OF OUR CONVERSATION WAS ABOUT MR. COMEAUX THINKING HE HAD A CHANCE TO WIN AN ELECTION AS PRESIDENT OF LOCAL 455. I MADE A COMMENT TO GREG, "THAT'S WHAT THEY NEED" (REFERRING TO CHANGE)—"LEADERSHIP IN PLACE OF DICTATORSHIP." ON DECEMBER 9, 1992, I WAS WRITTEN A LETTER BY RAY WOOSTER STATING THAT MY LAYOFF STATUS HAD BEEN CHANGED FROM TEMPORARY TO PERMANENT. I, THEREFORE, IMMEDIATELY LOST MY PAID HEALTH INSURANCE AND HAD TO OBTAIN COBRA COVERAGE AT MY OWN

EXPENSE. ($440.00 PER MONTH), THIS WAS ABSOLUTELY ESSENTIAL BECAUSE MY HUSBAND HAD PREVIOUSLY HAD A HEART ATTACK.

15. PRIOR TO DECEMBER 8, 1992, I LEARNED THAT GREG SCHULZE HAD A DIRECT REPORTING RELATIONSHIP TO RAY WOOSTER AND RICHARD ELLIOTT, HIS EXECUTIVE ASSISTANT. MR. SCHULZE AND OTHER SENIOR ASSISTANT AGENTS WERE EXPECTED TO REPORT ABOUT WHAT THEY HEARD IN THE FIELD. IT WOULD BE ENTIRELY CONSISTENT WITH MY KNOWLEDGE OF GREG SCHULZES' RELATIONSHIP WITH MESSRS. WOOSTER AND ELLIOT TO BELIEVE THAT HE IMMEDIATELY REPORTED OUR DECEMBER 8, 1992 CONVERSATION TO THEM, WHICH IN TURN LED TO MY PERMANENT LAYOFF AND LOSS OF INSURANCE.

Dated SEPT. *18th*, 1995

/s/ Clara Jean Bane
CLARA JEAN BANE

SWORN TO AND SUBSCRIBE BEFORE
THIS *18* DAY OF *SEPT.*, 1995.

/s/ M.D. Grimes
NOTARY PUBLIC
MY COMMISSION EXPIRES
9-18-95

M.D. GRIMES
MY COMMISSION
EXPIRES
October 26, 1995